

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network,

Complainant,

vs.

Pacific Bell Telephone Company and
AOL-Time Warner, Inc.,

Defendants.

Case 02-07-044
(Filed July 24, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING DENYING
PACIFIC BELL MOTION TO DISMISS**

1. Summary

Pacific Bell Telephone Company, now SBC California (SBC) moves to dismiss this complaint against it on grounds that there is no triable issue of fact as to SBC and that declarations by SBC employees prove that SBC cannot be liable for unauthorized charges to customers who dial their Internet Service Provider (ISP). For the reasons set forth below, this ruling concludes that material issues of fact remain in dispute as to SBC's procedures and practices for dealing with ISP calls. Accordingly, SBC's motion to dismiss is denied.

2. Background

The Utility Consumers' Action Network (UCAN) filed this action against SBC and AOL-Time Warner, Inc. (referred to herein as AOL¹) on July 24, 2002, alleging that AOL Internet subscribers are being subjected to unauthorized toll charges on their telephone bills as a result of the actions of SBC and AOL. Specifically, UCAN alleges that the one or both defendant companies reroute or otherwise convert telephone calls of their customers from local telephone numbers to toll numbers when customers attempt to dial up their ISP. The complaint alleges that toll charges for such dial-up calls can mount to hundreds of dollars before customers receive their phone bills and learn that their Internet dial-up number was not toll-free.

SBC and AOL timely filed answers denying the allegations of the complaint. AOL states that it supplies lists of dial-up numbers to its subscribers and cautions the subscribers to check with their local phone company to be sure the numbers that they select are local calls. SBC states that toll charges for calls to ISPs should be borne by customers because they have exclusive responsibility for selecting the number to be dialed and the computer equipment that actually dials the number.

AOL on October 21, 2002, moved for a dismissal of the case against it on grounds that the Commission lacks jurisdiction over ISPs. UCAN opposed the motion in a response dated November 5, 2002. AOL was permitted to reply to the response and did so on November 15, 2002. Action on the motion was stayed while SBC conducted a customer survey that the parties hoped might lead to

¹ AOL-Time Warner is the parent company of its internet service provider subsidiary, America Online, Inc. For simplicity, this ruling refers to the two entities as AOL.

settlement. At the request of the parties, the Commission in January of this year extended the statutory deadline for resolution of this case to accommodate the settlement discussions.

SBC on May 19, 2003, moved to dismiss the complaint against it on the basis that its customer survey, conducted over the course of six weeks, along with declarations of four SBC employees, prove conclusively that SBC is not at fault when its customers place what they thought would be a free call to an ISP and instead incur toll charges. UCAN opposes SBC's motion to dismiss.

A prehearing conference was conducted on June 4, 2003, at which time the parties jointly requested a further stay of two months so that they could continue discussions among themselves. Both AOL and SBC requested that no rulings issue on their motions to dismiss until after the parties had an opportunity to discuss settlement. A second prehearing conference was conducted on August 13, 2003, at which time it became clear that settlement was unlikely. For the reasons set forth below, SBC's motion to dismiss is denied.

3. Positions of the Parties

SBC files its motion to dismiss under Rule 56 of the Rules of Practice and Procedure. It notes that a Rule 56 motion to dismiss is analogous to a motion for summary judgment in civil practice. (*See, Westcom Long Distance, Inc. v. Pacific Bell* (1994) 54 CPUC2d 244, 249.) On summary judgment, the moving party has the burden of showing by means of affidavits, declarations, admissions and other evidence that there are no disputed issues of material fact. (*Westcom*, 54 CPUC2d at 249, citing Code of Civ. Proc. § 437(c).)

SBC submits declarations by four employees purporting to show, among other things, that SBC's switching equipment routes calls based on the prefix dialed by the customer or the customer's computer and cannot reroute calls from a toll-free prefix to a toll prefix. The declarations also assert that SBC's survey of

customers whose ISP calls were unintentionally placed as toll calls showed that the overwhelming majority of customers set up their ISP telephone number themselves and solved the toll charge problem by changing their ISP telephone number to ones that were toll free. SBC states:

The survey confirms, as SBC California expected, that the problem is due to customer error in programming their computer dialers. The problem is out of SBC California's hands. SBC California does not select the ISP, does not set up the dialer, does not provide the access numbers, and obviously cannot verify for the customer whether a certain number is local or toll without the customer making contact. (Motion to Dismiss, at 11.)

UCAN responds that SBC's motion should be denied on procedural grounds because the utility failed to comply with the Rule 56 requirement of providing five days' written notice of its intention to file a motion to dismiss. More substantively, UCAN argues that in a motion to dismiss, the facts outlined in the complaint are assumed to be true and the motion cannot be granted so long as material facts are disputed. (*Westcom*, 54 CPUC2d at 249.) UCAN asserts that "an unverified survey conducted internally by SBCPacific" cannot be undisputed proof of key facts necessary to support a motion to dismiss. UCAN adds:

Even SBCPacific's own evidence presented here shows conflicts that deserve airing in front of this Commission. While SBCPacific claims to be doing all that it can to urge consumers to check the locality of the number dialed and to make that information accessible to consumer, SBCPacific presents a survey that shows that these efforts have been ineffective, since several thousands of customers annually are still incurring toll charges for calling their ISP, costing California consumers untold millions in surprise charges each year. (Response, at 5; citations omitted.)

4. Discussion

The Commission can only grant a motion to dismiss and end a complaint without hearings where the facts set forth in the complaint do not raise issues appropriate for Commission review. As the Commission stated in *CPN Pipeline v. PG&E*, D.01-05-086,

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (E.g., *MCI Telecommunications Corp v. Pacific Bell*, D.95-05-020, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal.P.U.C. 166.)

By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that complainant will be able to prove everything alleged in its complaint. We do not accept as true the ultimate facts, or conclusions, that complainant alleges, for instance, that SBC has caused unauthorized toll charges to appear on telephone bills by rerouting the telephone calls of its customers.

The complaint presents allegations that two individuals were billed by SBC for toll calls for several months despite efforts to prevent such calls from occurring. SBC's motion fails to present any evidence specific to the two customers discussed in the complaint. The complaint implies that thousands of consumers may be similarly affected, and that SBC has taken insufficient steps to correct the problem while amassing windfall revenue from unintended toll calls to ISPs. SBC's own survey suggests that there is a serious problem here worthy of full hearing by the Commission.

While it is true, as SBC notes, that the Commission in at least one case has concluded that the customer was at fault for programming a computer to dial an ISP number outside the local calling area (*see* D.00-12-010), the Commission in at

least four recent decisions has held SBC responsible for toll charges to ISPs. (*See* D.03-04-012, D.03-04-013, D.03-04-014 and D.02-08-069.²) The four decisions rely in part on the fact that SBC at one point did not include local toll prefix information in the front of its White Pages, as was previously its practice.

Finally, as a practical matter, it is difficult to see how the Commission can consider SBC's motion to dismiss this complaint on the basis of internal survey results that have not been subjected to cross-examination or other scrutiny by the complainants. Indeed, in another motion, SBC seeks to have the survey results filed under seal so that the information cannot be made part of the public record in support of the motion to dismiss.

Accordingly, this ruling finds that SBC has failed to establish an absence of triable issues of fact as to its practices and procedures with respect to subscribers' ISP service, and the motion must be denied. In view of the comprehensive filings on this motion, along with argument received at the prehearing conferences, this ruling finds that further oral argument on the motion is unnecessary, and the request for such argument is denied.

IT IS RULED that Pacific Bell Telephone Company's Motion to Dismiss UCAN Complaint and Request for Oral Argument is denied.

Dated August 14, 2003, at San Francisco, California.

/s/ GLEN WALKER
(by Lynn Carew)

² SBC has filed applications for rehearing of the first three of these decisions.

Glen Walker
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Pacific Bell Motion to Dismiss on all parties of record in this proceeding or their attorneys of record.

Dated August 14, 2003, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

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